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# WISCONSIN'S UNFAIR SALES ACT — UNFAIR TO WHOM?

MICHAEL P. WAXMAN\*

## I. INTRODUCTION

The Wisconsin Unfair Sales Act<sup>1</sup> was enacted in 1939 during the Great Depression to prevent large retailers from selling below cost, an "act of unfair competition"<sup>2</sup> which was seen as one of the primary causes of small business failures.<sup>3</sup> Despite numerous amendments during the almost half century since its passage, its ostensible purpose has remained the same: to protect small retailers from predatory pricing. Yet the Act has been rarely enforced. It has been analyzed in only five reported judicial decisions<sup>4</sup> and eleven Attorney General advisory opinions.<sup>5</sup> In the most recent reported case, *State v. Eau Claire Oil Co.*,<sup>6</sup> the Wisconsin Supreme Court, while upholding the constitutionality of the Act,<sup>7</sup> called for legislative action to review and, possibly, repeal the Act.<sup>8</sup> Since then, five bills to repeal the Act have been considered by the Wisconsin Legislature.<sup>9</sup> None have passed.

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1. WIS. STAT. § 100.30 (1979).

2. 1A R. CALLMAN, *THE LAW OF UNFAIR COMPETITION, TRADEMARKS & MONOPOLIES* § 7.02 at 9 (4th ed. 1981).

3. Note, 1941 WIS. L. REV. 425, 425-26.

4. *State v. Eau Claire Oil Co.*, 35 Wis. 2d 724, 151 N.W.2d 634 (1967); *Heiden v. Ray's, Inc.*, 34 Wis. 2d 632, 150 N.W.2d 467 (1967); *State v. Ross*, 259 Wis. 379, 48 N.W.2d 460 (1951); *State ex rel. Heath v. Tanker Gas, Inc.*, 250 Wis. 218, 26 N.W.2d 647 (1947); *State v. Twentieth Century Mkt.*, 236 Wis. 215, 294 N.W. 873 (1941).

5. 63 Op. Att'y Gen. 516 (1974); 55 Op. Att'y Gen. 136 (1966); 53 Op. Att'y Gen. 1 (1964); 44 Op. Att'y Gen. 352 (1955); 43 Op. Att'y Gen. 104 (1954); 43 Op. Att'y Gen. 27 (1954); 38 Op. Att'y Gen. 172 (1949); 37 Op. Att'y Gen. 420 (1948); 36 Op. Att'y Gen. 459 (1947); 34 Op. Att'y Gen. 424 (1945); 28 Op. Att'y Gen. 700 (1939).

6. 35 Wis. 2d 724, 151 N.W.2d 634 (1967).

7. *Id.* at 732-33, 151 N.W.2d at 638-39, citing with approval its earlier finding of constitutionality in *State v. Ross*, 259 Wis. 379, 384-85, 48 N.W.2d 460, 463 (1951). *But see* *State v. Ross*, 259 Wis. at 388-90, 48 N.W.2d at 465-66 (Gehl, J., dissenting).

8. *State v. Eau Claire Oil Co.*, 35 Wis. 2d at 734-36, 151 N.W.2d at 639-40.

9. Numerous efforts have been made since 1967 to either repeal or otherwise limit the Wisconsin Unfair Sales Act. Wis. S.B. 403 (1981), Wis. A.B. 518 (1981), Wis. S.B. 599 (1977), Wis. A.B. 931 (1977), Wis. S.B. 317 (1975) (to repeal the Act); Wis. S.B. 257 (1979), Wis. A.B. 1324 (1973) (to eliminate criminal conviction); Wis. S.B. 616

The failure of these bills raises an interesting question for students of the legislative process. Why is an act which is seldom enforced and substantially criticized by the highest court in the state seemingly immune from repeal? Presumably the answer is that the Act provides a certain degree of protection to some class of citizens which that class is unwilling to relinquish regardless of how small that protection is in reality.<sup>10</sup>

This article will review the Unfair Sales Act from the point of view of those it is intended to protect — the small businessmen. Specifically, it will focus on the events leading to the enactment of the Wisconsin Unfair Sales Act, the operation of the Act in theory and practice, the relationship of the Act to other Wisconsin trade regulation laws, the ineffectiveness of the Act and alternative solutions.

## II. THE ENACTMENT OF THE WISCONSIN UNFAIR SALES ACT

From 1890 to World War I significant efforts were made through federal<sup>11</sup> and state law<sup>12</sup> to establish statutory stan-

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(1977), Wis. A.B. 930 (1977) (to lower the above cost minimum); Wis. S.B. 105 (1981), Wis. A.B. 167 (1981) (to exempt business in "enterprise zones").

10. Legislative protection tends to be at odds with our oft stated belief in a free enterprise system. This inconsistency can be seen in the legislative intent section of Chapter 133 which provides that:

It is the intent of the legislature to make competition the fundamental economic policy of this state and, to that end, state regulatory agencies shall regard the public interest as requiring the preservation and promotion of the maximum level of competition in any regulated industry *consistent with the other public interest goals established by the legislature.*

Wis. STAT. § 133.01 (1979) (emphasis added). Thus, we give lip service to the goal of unfettered competition yet regulate certain industries in order to achieve other socially desirable goals. Although the value of legislatively protecting small business has been hotly debated, this article will assume for the sake of analysis that this protection is necessary. On the issue of protecting small business, see generally *Yes, Virginia, There is Still a Robinson-Patman Act (But Should There Be?)*, 45 ANTITRUST L.J. 14 (1976). Compare Kintner, Henneberger & Fleischaker, *Reform of the Robinson-Patman Act: A Second Look*, 21 ANTITRUST BULL. 203; Wolfe, *Reform or Repeal of the Robinson-Patman Act: Another View*, 21 ANTITRUST BULL. 237 (1976).

11. See, e.g., Sherman Antitrust Act, 15 U.S.C.A. §§ 1-7 (1973 & Supp. 1982); Clayton Antitrust Act, 15 U.S.C.A. §§ 12-27 (1973 & Supp. 1982); and Federal Trade Commission Act, 15 U.S.C.A. §§ 41-58 (1973 & Supp. 1982).

12. See, e.g., Wisconsin "little Sherman Act," Wis. STAT. § 133.03 (1979).

dards to regulate unfair trade practices. These laws were essentially attempts to introduce rules of fair play into the free-for-all of mercantile competition. The early trade regulation legislation created guidelines more akin to "foul lines" in baseball than a straight and narrow path. These guidelines indicated the boundaries beyond which a trade practice enters the realm of unfair competition, but generally did not define gradations of "bad" acts within the trade practice "playing field."<sup>13</sup>

After World War I there was a lull in trade regulation laws until the economic woes of the Great Depression fostered the passage of legislation more specific in its rules and more extreme in its measures than the early trade regulation laws. The state and federal legislatures found themselves under pressure to produce legislation which would stem the tide of small business failures. On the federal scene this culminated in the passage of the National Industrial Recovery Act (NRA).<sup>14</sup> One of the primary goals of the NRA was to prevent economic dislocation of "mom and pop" shops by the growth of "mass-merchandisers."<sup>15</sup>

Although the NRA was declared unconstitutional,<sup>16</sup> numerous politically popular laws were enacted which established trade regulation concepts similar to those of the NRA. The Robinson-Patman Act amendments to Section 2 of the Clayton Antitrust Act<sup>17</sup> and state versions called "little Robinson-Patman" acts,<sup>18</sup> as well as the abundance of unfair

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13. Federal Trade Commission Act, ch. 311, § 5, 38 Stat. 719 (1914) provides: "Unfair methods of competition in commerce are declared unlawful." Sherman Anti-trust Act, ch. 647, § 1, 26 Stat. 209 (1890) provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal."

14. National Industrial Recovery Act, ch. 90, 48 Stat. 195 (1933) [hereinafter cited as NRA].

15. The NRA Codes contained 352 provisions prohibiting sales below costs. L. LYON, THE NATIONAL RECOVERY ADMINISTRATION 580-83, 585 (1935). "The statutes [unfair sales acts] are lineal descendants of the code provisions, both deriving from the depression." Note, *supra* note 2, at 426 n.4.

16. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

17. Robinson-Patman Act, 15 U.S.C.A. § 13 (Supp. 1982).

18. See, e.g., CAL. BUS. & PROF. CODE §§ 17040-42 (West 1964); FLA. STAT. ANN. §§ 540.01-540.06 (West 1972); IOWA CODE ANN. §§ 551.1-551.2, 551.4-551.11 (West 1950); 1981 KY. REV. STAT. & R. SERV. §§ 365.020, 365.050-365.090 (Baldwin); MINN. STAT. ANN. § 325D.03 (West 1981). For a complete survey of unfair sales and price discrimination acts, see Goodrich, *Minnesota Price Discrimination and Sales-Be-*

sales acts,<sup>19</sup> resurrected many concepts embodied in the NRA but generally withstood constitutional scrutiny.<sup>20</sup> In Wisconsin, a little Robinson-Patman Act<sup>21</sup> was passed in 1913<sup>22</sup> and a general Unfair Sales Act<sup>23</sup> was passed in 1939.<sup>24</sup>

Although the little Robinson-Patman Act and the Unfair Sales Act were passed at different times, they arose from the same concern for protecting small business from mass-merchandise economic power.<sup>25</sup> The former was intended to protect small business from large purchasers exercising their more powerful buying power.<sup>26</sup> The latter was intended to protect small businesses from being undersold by larger businesses selling at low prices.<sup>27</sup> The latter was reinforced by the Wisconsin Fair Trade Act.<sup>28</sup>

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*low-Cost Statutes: Should They Be Repealed, Amended or Left Alone?*, 5 WM. MITCHELL L. REV. 1, 83-107 App. (1979).

19. See, e.g., CAL. BUS. & PROF. CODE §§ 17030, 17043-44 (West 1970); 1981 KY. REV. STAT. & R. SERV. § 365.030 (Baldwin 1981); PA. STAT. ANN. tit. 73, §§ 211-217 (Purdon 1971); S.C. CODE ANN. § 39-3-150 (Law. Co-op. 1976); TENN. CODE ANN. § 69-301-306 (1976).

20. 1A R. CALLMAN, *supra* note 2, § 7.09.

21. WIS. STAT. §§ 133.04-133.05 (1979).

22. Act of May 2, 1913, ch. 165, 1913 Wis. Laws 159 & Act of May 1, 1935, ch. 52, 1935 Wis. Laws 80.

23. WIS. STAT. § 100.30 (1979).

24. Act of May 2, 1939, ch. 56, 1939 Wis. Laws 72.

25. Note, *Statutory Bans Against Selling Below Cost: The Latest Antidote for Big Business*, 25 VA. L. REV. 699 (1939).

26. WIS. STAT. § 133.04 (1979). See Gifford, *Promotional Price-Cutting and Section 2(a) of the Robinson-Patman Act*, 1976 WIS. L. REV. 1045, 1045-46.

27. Note, *supra* note 3, at 425-27.

28. WIS. STAT. ANN. § 133.25 (1974) (repealed 1977). The fair trade laws were a state-sanctioned method of distribution which permitted a manufacturer to fix the prices at which his goods were to be resold by wholesalers and retailers after title to the goods had passed to them. Although the Wisconsin Fair Trade Act was upheld as constitutional in *Weco Products Co. v. Reed Drug Co.*, 225 Wis. 474, 274 N.W. 426 (1937), it legalized resale price maintenance, which is illegal per se under the Sherman Act, 15 U.S.C. § 1 (1976).

In 1937 the United States Congress passed the Miller-Tydings Act, Act of Aug. 17, 1937, ch. 690, 50 Stat. 693 (repealed 1975) which amended the Sherman Act. The Miller-Tydings Act was a federal enabling statute which created an exemption from antitrust coverage for resale price maintenance if a state chose to have a "fair trade" act. In 1952 Congress passed the McGuire Act, Act of July 14, 1952, ch. 745, § 2, 66 Stat. 632 (repealed 1975), which included "nonsigner" enforcement in the federal antitrust exemption. In 1975 Congress enacted the Consumer Goods Pricing Act, Act of Dec. 12, 1975, § 2, 89 Stat. 801, which repealed the Miller-Tydings and McGuire Acts effective March 11, 1976.

Wisconsin repealed its Fair Trade Act in 1977 (Act of July 21, 1977, ch. 49, 1977 Wis. Laws 49) in response to the repeal of the Miller-Tydings and McGuire Acts.

The Wisconsin Unfair Sales Act is very similar to most unfair sales acts passed in the 1930's after the NRA was declared unconstitutional.<sup>29</sup> Intended to rectify the imbalance of power that permitted mass merchandisers to sell at a lower price than small businesses (especially below cost loss leaders), it was primarily directed at retail sales to the ultimate consumer rather than wholesale operations. As set forth in the policy section of the Act, "the practice of selling . . . below cost in order to attract patronage is generally a form of deceptive advertising and an unfair method of competition in commerce."<sup>30</sup>

The policy would seem to exclude below cost sales to retailers as it is assumed retailers know enough to protect themselves from deceptive advertising. In any event the problem of the wholesaler who discounts his price to one retailer over another is taken care of by the little Robinson-Patman Act which requires wholesale prices to be offered equally to all buyers.<sup>31</sup> Also, if a wholesaler used very low prices to drive competitors out of business or to otherwise inflict deadly competitive harm, it would violate the "predatory pricing"<sup>32</sup> standards of the little Sherman Act.<sup>33</sup>

With the recent double digit inflation seen as the greatest threat to our economy, it is hard for us to imagine what it was like to live in a time of falling prices. But price cutting was just as feared in the Great Depression as rising prices are today. The Unfair Sales Act reflects a fear of a cascading chain of events culminating in depression.<sup>34</sup> The links in the chain are: (1) mass-merchandisers would, through various improper acts, lure consumers away from "dealers who

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29. Houston, *Minimum Markup Laws: An Empirical Assessment*, 57 J. RETAILING 98, 99 (1981).

30. WIS. STAT. § 100.30(1) (1979).

31. WIS. STAT. §§ 133.04-.05 (1979). See also *Id.* § 133.17.

32. "Predatory pricing" has been generally defined as "an antitrust violation generally manifested by selling below one's own cost for the purpose of effectuating long term domination of the market." *Outboard Motor Corp. v. Pezetel*, 461 F. Supp. 384, 400 (D. Del. 1978). "[It is] motivated either by an intent to destroy competition or to eliminate competition." 1A R. CALLMAN, *supra* note 2, § 7.52. For a brief legal/economic definition see P. AREEDA, *ANTITRUST ANALYSIS* (1981), which describes predatory pricing as "pricing below the short-run profit maximizing price, or pricing below variously defined costs." *Id.* at 190.

33. WIS. STAT. § 133.03 (1979).

34. *Id.* § 100.30(1).

maintain a fair price"; (2) "fair price" dealers (generally "mom and pop" shops) would be driven out of business, causing commercial dislocation and bankruptcies; (3) the failure of many small businesses would lead to an "inevitable train of undesirable consequences, including depression."<sup>35</sup> Theoretically, this would also lead to price increases once the "fair price" competition was out of business. It is this sequence of events which the Wisconsin Unfair Sales Act was intended to prevent.

### III. HOW THE UNFAIR SALES ACT OPERATES IN THEORY

The Wisconsin Unfair Sales Act has three particular purposes: (1) to prevent unfair discrimination by wholesalers; (2) to prevent "predatory price-cutting" by wholesalers and retailers; and (3) to protect small retailers by requiring that sales prices be at least a certain percentage above cost. In order to protect small business from the disastrous consequences of price-cutting the Wisconsin Unfair Sales Act established a "fair price policy"<sup>36</sup> and a method of computing a "fair price." The fair price policy is, simply stated, that the selling price for a retailer shall be greater than "cost" as defined by the statute.<sup>37</sup> Cost to the retailer (in the absence of proof of a lesser cost) is the retailer's purchase cost plus overhead plus six percent.<sup>38</sup> Cost to the wholesaler equals the wholesaler's purchase cost plus overhead plus three percent.<sup>39</sup> Thus, subject to certain specific statutory defenses,<sup>40</sup> advertising or offering for sale or selling below cost is illegal.

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35. *Id.*

36. *Id.*

37. *Id.* § 100.30(2).

38. *Id.* § 100.30(2)(a).

39. *Id.* § 100.30(2)(b).

40. *Id.* § 100.30(6), which provides:

(6) EXCEPTIONS. (a) The provisions of this section shall not apply to sales at retail or sales at wholesale where:

1. Merchandise is sold in bona fide clearance sales.

2. Perishable merchandise must be sold promptly in order to forestall loss.

3. Merchandise is imperfect or damaged or is being discontinued.

4. Merchandise is sold upon the final liquidation of any business.

5. Merchandise is sold for charitable purposes or to relief agencies.

6. Merchandise is sold on contract to departments of the government or governmental institutions.

Although the computation of cost appears fairly simple,<sup>41</sup> it becomes more difficult when you begin to apply it to a variety of merchandising schemes, such as the sale of an item significantly below cost to induce other purchases (often referred to as a "loss leader"),<sup>42</sup> or the giving of an item which does not require another purchase (gift), or the tying of a gift or below-cost item to the purchase of another item. Under the Unfair Sales Act loss leaders, whether separate or tied, are illegal,<sup>43</sup> while gifts that are not tied to the sale of other items are legal.<sup>44</sup>

On the other hand, gifts that are tied to the sale of another item may or may not be legal depending on whether their overall selling price is below cost. There are two accepted ways for computing whether such sales are below cost.<sup>45</sup> First, when the gift has no disclosed price, the selling price of all items could be totaled and then the cost could be

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7. The price of merchandise is made in good faith to meet an existing price of a competitor and is based upon evidence in the possession of the seller in the form of an advertisement, proof of sale or receipted purchase.

8. Merchandise is sold by any officer acting under the order or direction of any court.

(b) No person may claim the exemptions under par. (a) 1 to 4 if he limits or otherwise restricts the quantity of such merchandise which can be purchased by any buyer or if he fails to conspicuously disclose the reason for such sale in all advertisements relating thereto and on a label or tag on such merchandise or on a placard where the merchandise is displayed for sale.

41. *Id.* § 100.30(2).

42. Callman defines a "leader" as "[a]n article offered for sale at a greatly reduced price for the purpose of attracting trade. . . . If it sells at less than cost to the seller, it is a 'loss leader.'" 1A R. CALLMAN, *supra* note 2, § 5.44. The Wisconsin Unfair Sales Act broadly prohibits loss leaders and assumes an illegal purpose even if an intent cannot be proven. WIS. STAT. § 100.30(3) (1979) provides:

Any sale of any item of merchandise either by a retailer or wholesaler, at less than cost as defined in this section with the intent or effect of inducing the purchase of other merchandise or of unfairly diverting trade from a competitor, impairs and prevents fair competition, injures public welfare and is unfair competition and contrary to public policy and the policy of this section. Such sales are prohibited.

43. WIS. STAT. § 100.30(3) (1979). This would be a violation even if the defendant realized an overall profit which would otherwise comply with the Act. *State v. Eau Claire Oil Co.*, 35 Wis. 2d 724, 735, 151 N.W.2d 634, 640 (1967).

44. 44 Op. Att'y Gen. 352, 353 (1955). Therefore, if a bar of soap is "sold" for a penny (\$.01) the sale would be in violation of the Act if the soap cost the seller a price approaching a penny. Yet the same bar of soap given away would constitute a gift and be in compliance with the Act.

45. WIS. STAT. § 100.30(2)(j) (1979).



subtracted.<sup>46</sup> Each item "below cost" is thereby assisted by above-cost items — this method is easiest when the items are of the same type, hardest when they are goods of varying nature. Second, where each item is assigned a separate price, the Act requires that the selling price of each item must not be below cost. A strict accounting method must be used to protect retailers and wholesalers from suit.

Enforcement of the statute is by injunction and/or criminal prosecution. Any person damaged or threatened with loss or injury may seek injunctive relief.<sup>47</sup> If the private litigant sues and wins, the violator must pay the plaintiff's court costs and reasonable attorneys' fees.<sup>48</sup> Unfortunately, there is no provision for recovery of damages. What must be shown to prove damage or the threat of loss is unclear. What is clear is that the standard of proof is very high.<sup>49</sup>

Interestingly, the standards for obtaining a criminal conviction appear fairly simple: evidence of any sale, advertisement or offering for sale of any item of merchandise at less than cost shall be prima facie evidence of intent to induce the purchase of other merchandise in violation of the statute.<sup>50</sup> The retailer or wholesaler could be fined or imprisoned or both<sup>51</sup> if he cannot: (1) refute the below-cost selling charge; (2) show that he is meeting what he justifiably believes to be legal competition of a competitor; or (3) fit under the eight particular exceptions enumerated in the statute.<sup>52</sup> In addition, there are other special remedies available to district attorneys and the Wisconsin Department of Agriculture, Trade and Consumer Protection.<sup>53</sup>

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46. *Id.*; 44 Op. Att'y Gen. 352, 353 (1955). See also *State ex rel. Heath v. Tankar Gas, Inc.*, 250 Wis. 218, 222-23, 26 N.W.2d 647, 649 (1947).

47. WIS. STAT. § 100.30(5)(c) (1979).

48. *Id.*

49. *Heiden v. Ray's, Inc.*, 34 Wis. 2d 632, 638-39, 150 N.W.2d 467, 470-71 (1967). Surprisingly, the standard sufficient to establish a prima facie criminal case is significantly easier to meet than the unclear civil one. Further, the retailer's theory that any sale below cost must injure him was "based upon 'sheer speculation.'" *Id.* "[T]here is no presumption of loss or threat of injury to competitors from the fact of a sale below cost arising out of sec. 100.30(5), Stats. 1963 . . . ." *Id.* at 639, 150 N.W.2d at 470.

50. WIS. STAT. § 100.30(3) (1979).

51. *Id.* § 100.30(4).

52. *Id.* § 100.30(6)(a).

53. *Id.* § 100.30(5)(a), (b).

The prima facie test or presumption of intent to injure was written into the Wisconsin Unfair Sales Act in order to meet a constitutional challenge. The only unfair sales acts that have successfully withstood constitutional attack have been those which require an intent to injure or destroy a competitor's business by below cost selling.<sup>54</sup> In its initial review of section 100.30 the Wisconsin Supreme Court found that the state had failed to prove an intent to injure or destroy a competitor's business as required in the policy section.<sup>55</sup> Thus the Wisconsin Legislature faced the problem of lessening the state's burden of proof yet maintaining the statute's constitutionality. The legislature responded to this problem by making the advertising or offering for sale or selling below cost prima facie proof of intent to injure.<sup>56</sup> This new standard was subsequently approved by the Wisconsin Supreme Court in *State v. Ross*.<sup>57</sup>

#### IV. HOW THE UNFAIR SALES ACT OPERATES IN PRACTICE

Given the high cost of maintaining records sufficient to defend against suits under the Unfair Sales Act and the seemingly limitless imagination mass merchandisers show in devising marketing schemes,<sup>58</sup> violations of the statute should be very common.<sup>59</sup> Yet there have been very few cases brought under the statute. Indeed, there are no recorded decisions since 1967. There are several reasons for this lack of interest in the Act.

First, there is very little incentive to bring private actions. Because the Unfair Sales Act contains no provision for re-

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54. 1A R. CALLMAN, *supra* note 2, § 7.08.

55. *State v. Twentieth Century Mkt.*, 236 Wis. 215, 221-23, 294 N.W. 873, 876 (1940).

56. WIS. STAT. § 100.30(3) (1979).

57. 259 Wis. 379, 385-86, 48 N.W.2d 460, 463-64 (1951). See also 43 Op. Att'y Gen. 27 (1954).

58. Examples of marketing schemes are vertical integration of the distribution chain, "housebranding" and "one-cent sales," in which a consumer purchases an item at the "regular" price and for a penny more the consumer gets an equivalent amount of the same item. As to vertical integration and housebranding see Part III and accompanying notes.

59. *Heiden v. Ray's, Inc.*, 34 Wis. 2d 632, 639-40, 150 N.W.2d 467, 471 (1967). See also *infra* note 63.

covery of damages and the standard of proof is uncertain in private suits, only one case has been brought by a private plaintiff.<sup>60</sup> The most effective trade regulation laws are ones that are privately enforced<sup>61</sup> because competitors have the greatest interest, most knowledge, most to be gained and most resources to devote to pursuing violators. If the Unfair Sales Act had private treble damage provisions<sup>62</sup> similar to the antitrust laws, it would make it worthwhile for attorneys to take on cases under contingent fee agreements. The prospect of treble damages at the end of a long and tedious antitrust case has spurred on many private litigants' attorneys. Without such damage provisions there will never be many private actions under the Unfair Sales Act.

Secondly, state authorities are apparently reluctant to enforce a criminal statute which relies on a presumption of intent to act illegally.<sup>63</sup> Selling below cost is not illegal if it is only done to gain business.<sup>64</sup> It becomes illegal when it is done with the intent to injure competitors or destroy compe-

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60. *Heiden v. Ray's, Inc.*, 34 Wis. 2d 632, 150 N.W.2d 467 (1967).

61. Sherman Antitrust Act, 15 U.S.C.A. §§ 1-7 (1973 & Supp. 1982); Robinson-Patman Act, 15 U.S.C.A. § 13 (Supp. 1982).

62. Proposed Bill of the Special Committee on the Unfair Sales Act to the Legislative Council, Wisconsin Legislative Council Staff, No. 127/2, at 5 (Jan. 20, 1981).

63. Letter from Robert H. Park, Chief, Business Practices Section, Bureau of Trade Practices, Trade Division, Wisconsin Department of Agriculture, Trade and Consumer Protection, Madison, Wisconsin to E. Gail Misfeldt, Assistant Professor, Department of Habitational Resources, School of Home Economics, University of Wisconsin-Stout, Menomonie, Wisconsin (Apr. 19, 1979).

The honoring of the Act appears to be more in its breach, than in compliance. *See, e.g., Heiden v. Ray's, Inc.*, 34 Wis. 2d 632, 640-41, 150 N.W.2d 467, 471 (1967). Since 1970 district attorneys have brought only 16 cases out of approximately 7,000-10,000 written complaints. These cases are all unrecorded Wisconsin Circuit Court opinions. Interestingly, most of the defendants pled guilty or nolo contendere despite the fact that they would be subject to possible imprisonment for this violation. Although these outcomes have been the result of plea bargaining and have resulted in only small fines, there may be increased fines and contempt citations for future violations.

Only two cases have been contested. In *State v. Shopko Stores*, No. 10629 (La Crosse County Cir. Ct. Oct. 18, 1978), Judge Montabon dismissed the case for denial of equal protection through selective enforcement. The complaint was dismissed also in the other contested case, *State v. Cub Foods*, No. 82-CV-851 (Brown County Cir. Ct. July 19, 1982).

64. "Nothing prevents the seller from selling below cost, if he wishes to do so; he is under no obligation to attempt to realize a profit. . . . If the law dictated otherwise, it would necessarily mandate an invasion of private business. . . ." 1A R. CALLMAN, *supra* note 2, § 7.01, at 3.

tition.<sup>65</sup> The problem with prima facie proof as applied under the Unfair Sales Act is that the Act presumes the purpose of the below cost selling is to destroy competition and thereby shifts the burden to the defendant.<sup>66</sup> Although a malevolent purpose may be inferred from a course of conduct such as the systematic and continuous undercutting of a particular rival while having superior financial resources, enforcement officials are naturally reluctant to presume such purpose without a great deal of evidence or a long history of participation in a scheme of systematic price-cutting with no other purpose than the destruction of a competitor.<sup>67</sup>

A third reason the Act is not enforced is the exception created by an interpretation of the Unfair Sales Act by the Wisconsin Attorney General which gives mass merchandisers a great advantage over small retailers. The opinion permits the sale of "house" or "private label" brands for less than branded products,<sup>68</sup> while prohibiting retailers from re-

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65. "[T]he phrase 'to injure competition' is meaningful only with the additional word 'illegally.'" 1A R. CALLMAN, *supra* note 2, § 7.08. "The element of illegality is not the low price of a particular bargain nor the fact that [a seller] is willing to suffer loss, but the fact that [the seller] has adopted a plan or scheme of aggression — systematic price-cutting — with the destruction of a competitor as his ultimate goal." *Id.* § 7.01.

66. *State v. Ross*, 259 Wis. 379, 385, 48 N.W.2d 461, 463-64 (1931). *See also* Note, 1948 Wis. L. REV. 395, 400.

The validity of the prima facie proof standard is very questionable. Sandstrom v. Montana, 442 U.S. 510 (1979), declared mandatory presumptions unconstitutional. A mandatory presumption is "an irrebuttable direction by the court to find the presumed fact once convinced of the facts triggering the presumption." *Id.* at 517.

The Wisconsin Supreme Court is divided as to the proper application of *Sandstrom*. The majority in *Muller v. State* found that as long as only "some" evidence is required from the defendant there is no shifting of the burden of proof. 94 Wis. 2d 450, 473-78, 289 N.W.2d 570, 579-84 (1980). A vigorous dissent decried the majority's interpretation and recommended a more literal following of *Sandstrom*. *Id.* at 478-90, 289 N.W.2d at 584-90 (Abrahamson, J., dissenting). The Unfair Sales Act prima facie proof standard appears to violate either interpretation. *See* Note, 1980 Wis. L. REV. 366.

67. 1A R. CALLMAN, *supra* note 2, §§ 7.01, 7.16-.17. Note the limited number of cases brought under the Act. *See also supra* notes 4 & 63.

68. After the branding decision has been made, the manufacturer has three options with respect to brand sponsorship. The product may be launched as a *manufacturer's brand* (also called a national brand) where the manufacturer is recognized as the producer of the product. Or the manufacturer may sell the product in bulk to middlemen who put on a *private brand* (also called middlemen brand, distributor brand, or dealer brand). Or the manufacturer may decide to produce some output under its own name and some output that is

ducing the price of branded products below the "fair" price to compete with the house brands.<sup>69</sup> Obviously, this opinion places the small retailer at a disadvantage as he has little access to the house brands being sold by the mass merchandiser yet cannot reduce the price of his branded goods to compete with the mass merchandiser's lower priced house brands. This has probably led to the development of group purchasing of house brands by some smaller retailers, but has never really put them on a competitive level with the mass merchandiser.

In addition, a marketer who acts as his own wholesaler may allocate his profit even on branded label products to the wholesale or retail level depending upon which level better suits his purpose.<sup>70</sup> For example, if the "in house" marketer wholesales the item to himself (as retailer) he can make a very small profit at the wholesale level and thus give his retailer self a lower cost basis for compliance with the Unfair Sales Act. This would mean that the vertically integrated marketer could comply with the law while having both house brand and branded label products at prices below the level of his small business competitors.

#### V. THE RELATIONSHIP BETWEEN THE WISCONSIN UNFAIR SALES ACT AND OTHER WISCONSIN TRADE REGULATION LAWS

As described above, the primary purpose of the Unfair Sales Act was to put a stop to the below cost pricing schemes used by mass merchandisers to force out small businesses. However, the Wisconsin little Sherman Act<sup>71</sup> does a better

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sold under private labels [also called house brand]. For example, Kellogg's, International Harvester, and IBM produce virtually all of their output under various distributors' names. Whirlpool produces output both under its own name and under distributors' names.

P. KOTLER, *PRINCIPLES OF MARKETING*, at 377-78 (1980).

69. 43 Op. Att'y Gen. 27, 31 (1954). Although the opinion is unclear, a small retailer may be able to overcome the exception if he can show that consumers did not distinguish between the house brand and branded label.

70. Although the wholesaler-retailer must comply with WIS. STAT. § 100.30(2)(i) (1979) (which requires a vertically integrated marketer to maintain both the wholesaler and retailer minimum mark-up percentages), his allocation of profit will permit extensive manipulation.

71. WIS. STAT. § 133.03 (1979).

job of addressing the root problem of predatory pricing than does the Unfair Sales Act. As noted by Callman,<sup>72</sup> an improper horizontal practice (retail or wholesale) would be the sale of an item of merchandise at a price which is not just below a price the competitor could not meet or beat, or even a price which is intended to "steal" customers, but one which is intended to drive merchant(s) out of business. This would be "predatory pricing."<sup>73</sup>

Because predatory pricing has been considered to be an evil act undermining the open and free marketplace, it has been the subject of significant legislative<sup>74</sup> and judicial action.<sup>75</sup> Numerous articles have been written by renowned authors<sup>76</sup> analyzing the price at which the practice of below cost selling enters the realm of predatory pricing.

The Wisconsin little Sherman Act, like its federal counterpart, addresses the concern for predatory pricing.<sup>77</sup> Sec-

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72. 1A R. CALLMAN, *supra* note 2, § 7.01. See also Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of The Sherman Act*, 88 HARV. L. REV. 697 (1975).

73. A firm which drives out or excludes rivals by selling at unremunerative prices is not competing on the merits, but engaging in behavior that may properly be called predatory. There is, therefore, good reason for including a "predatory pricing" anti-trust offense within the proscription of monopolization or attempts to monopolize in section 2 of the Sherman Act. Areeda & Turner, *supra* note 72, at 697.

74. Sherman Antitrust Act, 15 U.S.C.A. §§ 1-7 (Supp. 1982); Federal Trade Commission Act, 15 U.S.C.A. §§ 41-58 (Supp. 1982); Robinson-Patman Act Amendment § 3 to the Clayton Antitrust Act, 15 U.S.C.A. § 13(c) (Supp. 1982); WIS. STAT. §§ 133.03-.04 (1979). See also ROBINSON-PATMAN ACT: POLICY AND LAW, PROPOSED PREDATORY PRACTICES ACT, APPENDIX B (ABA Antitrust Section, Monograph No. 4, 1980).

In addition to the clear concern for predatory pricing under the Sherman Act, interstate predatory pricing by wholesalers is effectively controlled by section 3 of the Robinson-Patman Act, 15 U.S.C.A. § 13(c) (Supp. 1982). Unlike section 2 of the Robinson-Patman Act, price discrimination is not a necessary element.

75. See, e.g., *Pacific Eng'g & Prod. Co. v. Kerr-McGee Corp.*, 551 F.2d 790 (10th Cir.), cert. denied, 434 U.S. 879 (1977); *International Air Indus. v. American Excelsior Co.*, 517 F.2d 714 (5th Cir. 1975), cert. denied, 424 U.S. 943 (1976).

76. Concerns for predatory pricing under the Sherman Act and for primary line injury under the Robinson-Patman Act are identical. Areeda & Turner, *supra* note 72, at 727. Profs. Areeda and Turner's analysis would also hold true for the Unfair Sales Act concern for predatory "below cost" pricing. See Areeda & Turner, *supra* note 72; Areeda & Turner, *Scherer On Predatory Pricing: A Reply*, 89 HARV. L. REV. 891 (1976); Scherer, *Predatory Pricing and the Sherman Act: A Comment*, 89 HARV. L. REV. 868 (1976); see also 3 AREEDA & TURNER, ANTITRUST LAW ch. 7C (1978), which contains a slightly modified test analysis.

77. A National District Attorneys Association — United States Department of Justice Law Enforcement Assistance Administration treatise on state antitrust law di-

tion 133.03(1) declares every contract combination or conspiracy in restraint of trade to be illegal.<sup>78</sup> Attempts to monopolize and successful monopoly are declared illegal whether done individually or as a conspiracy.<sup>79</sup> The punishment for violation of either section may be a substantial fine and a long-term imprisonment.<sup>80</sup> These penalties are more than ten times the possible punishment under the Wisconsin Unfair Sales Act.

Although the major thrust of the Unfair Sales Act is at horizontal competition, the statute clearly also applies to vertical competition. Analysis will show the Unfair Sales Act does not remedy any significant discrimination or unreasonably competitive harm in trade between wholesalers and retailers which is not remedied by other Wisconsin statutes.

Wisconsin's little Robinson-Patman Act<sup>81</sup> eliminates most vertical effects of below cost pricing and loss leaders by wholesalers. Like its federal counterpart, the little Robinson-Patman Act declares illegal discrimination in price (direct or indirect) between different purchasers of commodities of like grade and quality.<sup>82</sup> Therefore, sales below cost must be priced equally to all retail purchasers of the same product. Moreover, violations of the little Robinson-Patman Act are punishable by fines and imprisonment greater than those under the Wisconsin Unfair Sales Act.<sup>83</sup>

Another reason why the Act does not protect small business is the ease with which an alleged violator can defend himself by claiming he is just "meeting competition."<sup>84</sup> The meeting competition defense permits a party to meet what he

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rectly addresses the relationship between state "sales below cost" statutes and predatory pricing. It treats them identically. "Sales below cost, also known as predatory pricing, involves pricing by the seller below his own cost in order to drive competitors out of the market. Under federal law this practice is generally dealt with as a form of monopolization under Sherman Act § 2. As with federal law, the practice may also violate [state] general monopolization statutes." *A Treatise on State Antitrust Law and Enforcement: With Models and Forms*, ANTITRUST AND TRADE REG. REP. (BNA) No. 892 (Supp. 1) at 21 (Dec. 7, 1978).

78. WIS. STAT. § 133.03(1) (1979).

79. *Id.* § 133.03(2).

80. *Id.* § 133.03(1)-(3).

81. *Id.* §§ 133.04-.05.

82. *Id.* § 133.04(1).

83. *Id.* §§ 133.05(3), 133.05(4).

84. Meeting a legal price of a competitor is an affirmative defense which exempts

believes is a legal price of a competitor yet lower than his own.<sup>85</sup> A legal price is the applicable mark-up under the Wisconsin Unfair Sales Act. There are two major factors that the meeting competitor must stand ready to prove: that he, in good faith,<sup>86</sup> believed that the price was a legal one, and that he was only meeting the price of his competitor and not underbidding it.<sup>87</sup> Since it is illegal for a competitor to meet or beat an illegal price with further illegal prices,<sup>88</sup> a violating seller may gain a competitive advantage over his competitors by selling below cost (alleging he is meeting competition) until caught by state officials and found in violation or a competitor successfully brings an action for injunctive relief.

#### VI. WHY THE UNFAIR SALES ACT FAILS TO ACCOMPLISH ITS GOAL OF PROTECTING SMALL BUSINESS

In sum, the Unfair Sales Act fails to address the concerns of small business. It does not protect the vertical wholesaler-retailer marketplace as the little Robinson-Patman Act does. If anything, the Act shields vertically integrated mass marketers. It does not protect against predatory pricing as the little Sherman Act does. It does not even perform the function of an effective floor as a replacement for the repealed Fair Trade Act.<sup>89</sup>

With unfair vertical price discrimination by wholesalers and unfair predatory pricing by retailers more effectively controlled by other statutes, the Wisconsin Unfair Sales Act has been reduced to merely preventing the practice of pric-

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sales below cost from the Unfair Sales Act. WIS. STAT. § 100.30(6)(a)(7) (1979). This has been explained by the Wisconsin Attorney General:

Every time a dealer lowers his price to meet competition [sell at the same price as his competitor], he has to prove that he has acted in good faith. He must show that he in good faith believed he was meeting a *legal* price of his competitor. If the price which the dealer sets happens to be below his competitor's price, the dealer must also prove that he attempted in good faith only to *meet* his competitor's price and did not *intend* to sell below his competitor.

53 Op. Att'y Gen. 1, 14 (1964).

85. 53 Op. Att'y Gen. 1, 10 (1964).

86. *Id.* at 10-14.

87. *Id.*

88. *Id.*

89. *See supra* note 28.



ing items below the efficiency of competitors. Yet, even in this respect the Act fails to accomplish its goal of protecting small business. It fails because it does not provide a price differential sufficient to save the less efficient competitor and because effective means have been found to avoid the Act.<sup>90</sup> The Act merely protects against advertising or offering for sale or selling an item for less than six percent (three percent wholesale) above a cost which is the lower of the two possible purchase costs.<sup>91</sup> There is no research evidence that this amount is sufficient to keep afloat less efficient businesses.<sup>92</sup> Further, the Act has rarely been enforced. The few state efforts at enforcement have led to the imposition of minor fines,<sup>93</sup> arguably a cost of doing business. Due to the uncertainty of the standard of proof and the lack of incentives only one private action has been brought.<sup>94</sup> That action was unsuccessful. Ultimately, the Act has not stemmed the tide of small business bankruptcies.<sup>95</sup>

## VII. ALTERNATIVE SOLUTIONS

Despite the Unfair Sales Act's failure to achieve its goal of protecting small business it still has many supporters. Im-

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90. See Note, *supra* note 3, at 426 n.8. See also THE PROFIT AND PRICE PERFORMANCE OF LEADING FOOD CHAINS 1970-'74, STUDY PREPARED FOR THE JOINT ECONOMIC COMMITTEE, CONGRESS OF THE UNITED STATES (Apr. 12, 1977); Complaint, *State v. Cub Foods*, No. 82-CV-851 (Brown County Cir. Ct. July 19, 1982); Letter, *supra* note 63.

91. 28 Op. Att'y Gen. 700, 701 (1939).

92. Two studies have been made of the effects of the Wisconsin Unfair Sales Act. H. Cook, R. Deiter & W. Mueller, *The Effects of Wisconsin's Minimum Markup Law*, No. 62, University of Wisconsin Department of Agricultural Economics (May 30, 1973); Houston, *supra* note 29, at 99. These studies are distinctly in conflict in their evaluation of the Unfair Sales Act, but neither supports the concept that the minimum statutory markup would be sufficient to support a competitive business.

93. The recent policy of the Department of Agriculture, Trade and Consumer Protection after filing the complaint has been to plea bargain with the accused company and have it plead nolo contendere to a lesser number of counts. The court then finds the company guilty and fines it \$250 per count violated. See, e.g., *State v. K-Mart Corp.*, No. 80-CR-1607 (Fond du Lac County Cir. Ct. Jan. 7, 1981) (2 counts — \$500); *State v. Treasury Div. of J.C. Penney Co.*, (Dane County Cir. Ct. Feb. 27, 1981) (4 counts — \$1000); *State v. Kohl Corp.*, No. 80-CR-1210 (Fond du Lac County Cir. Ct. Dec. 3, 1980) (1 count — \$250). The *Treasury Div. of J.C. Penney Co.* case has been the largest fine issued under the law.

94. *Heiden v. Ray's, Inc.*, 34 Wis. 2d 632, 150 N.W.2d 467 (1967).

95. Houston, *supra* note 29, at 110.

portant trade associations,<sup>96</sup> the office of the Attorney General,<sup>97</sup> and the Wisconsin Department of Agriculture, Trade and Consumer Protection<sup>98</sup> all speak in favor of the Act's goals. Yet it would be foolhardy to predict that the Act will be any more vigorously enforced in the future than it has been in the past. Indeed, the Department of Agriculture, Trade and Consumer Protection, which has received (in conjunction with the district attorneys) primary responsibility for state enforcement of the Unfair Sales Act,<sup>99</sup> readily admits that there should be either a massive enforcement campaign or repeal of the Act.<sup>100</sup>

Although the Act has engendered much controversy, both its proponents and opponents agree it has failed to serve the purpose for which it was originally intended and needs to be radically altered.<sup>101</sup> The following alternative remedies in combination or alone should be considered as a

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96. Wis. S.B. 257 (1979) was submitted at the request of numerous retail trade associations. Although the bill would have decriminalized the Unfair Sales Act, it also would have greatly increased its penalties. *See also*, Testimony of Tom Dohm, Wisconsin Independent Businessmen, Inc., *Summary of Hearings of the Special Comm. on the Unfair Sales Act to the Wis. Legis. Council* (Dec. 15, 1980).

97. Letter from Alan Lee, Assistant Attorney General, Wisconsin Department of Justice, to Sumner P. Slichter, Esq. (Sept. 2, 1981).

98. *See* Testimony of Donald Soberg, Administrator, Trade Division, Department of Agriculture, Trade and Consumer Protection, *Summary of Hearings of the Special Comm. on the Unfair Sales Act to the Wis. Legis. Council* (Dec. 15, 1980).

99. WIS. STAT. § 100.30(5)(a), (b) (1979).

100. *See* Departmental Correspondence of the Department of Agriculture, Trade and Consumer Protection from C.L. Jackson [former administrator] to Gary Rohde (Jan. 13, 1978). *See also* Letter, *supra* note 63.

Those advocating repeal of the Unfair Sales Act have concentrated on the Act's negative impact on Wisconsin consumers. *See* Wis. S.B. 403 (1981); Wis. A.B. 518 (1981). Both bills were submitted at the request of the Wisconsin Consumers League. *See also* Testimony of Paul Hausman, Representative of the Wisconsin Consumers League, *Summary of Hearings of the Special Comm. on the Unfair Sales Act to the Wis. Legis. Council* (Dec. 15, 1980).

101. The preceding materials have revealed a pervasive dissatisfaction with the Act by its supporters and detractors. A 1973 bill, A. Res. 34, A.J. 1853 June 20, (1973), even called for the establishment of a Special Committee to the Legislative Council to study antitrust laws, predatory pricing and monopolistic business practices in Wisconsin and to develop legislation to protect small business. Although the bill was defeated, A. Res. 13, A.J. 209 Jan. 13, (1973), its call for such a committee while the Unfair Sales Act, little Sherman Act and little Robinson-Patman Act were in effect, indicates the ineffectiveness of the existing legislation to protect small business from the competitive methods of big business. *Contra* H. Cook, R. Deiter & W. Mueller, *supra* note 92. *But see* Houston, *supra* note 29.

way of achieving the goal of protecting small business from predatory pricing while avoiding the problems caused by the existing legislation.

*A. First — Repeal of the Unfair Sales Act*

A complete repeal of the Act followed by a strengthening of the little Sherman and Robinson-Patman Acts, including a legislative command and increased budgetary allocation to enforce those Acts with vigor, would not only eliminate the negative aspects of the Act cited by the state enforcing agencies but also provide them with the opportunity to demonstrate their concern for protecting small business against predatory conduct.

*B. Second — Retention of the Unfair Sales Act as a Private Civil Remedy*

A second alternative would be to turn the Unfair Sales Act into primarily a civil penalty statute by providing an opportunity for double or treble damages. This would diminish the problems of criminal penalties, selective enforcement and the reliance on public resources to enforce the Act. Instead private parties,<sup>102</sup> whose self-interest has proved to be the best enforcer of many regulatory schemes (for example, the Robinson-Patman Act), would take over the burden of enforcement.

*C. Third — Use of the Statutory Deceptive Practices Powers*

Finally, the Unfair Sales Act declares as its "policy" that "[t]he practice of selling below cost . . . is generally a form of deceptive advertising and an unfair method of competi-

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102. Although private parties could sometimes sue as more than one plaintiff, concerted efforts at enforcement of state sales below cost laws by a group of competitors, either by agreeing to a minimum price among the competitors or by threatening litigation has been held violative of the Sherman Act. 2 TRADE REG. REP. (CCH) ¶ 6805 (1971). See also *United States v. San Diego Grocers Ass'n*, 1962 Trade Cas. (CCH) ¶ 70,432 (D. Cal. 1962); *United States v. Connecticut Food Council*, 1940-43 Trade Cas. (CCH) ¶ 56,167 (D. Conn. 1941); *United States v. Maine Food Council*, 1940-43 Trade Cas. (CCH) ¶ 56,180 (D. Me. 1941); *United States v. Massachusetts Food Council*, 1940-43 (CCH) ¶ 56,165 (D. Mass. 1941); *United States v. Rhode Island Food Council*, 1940-43 Trade Cas. (CCH) ¶ 56,175 (D. R.I. 1941).

tion.”<sup>103</sup> Since sections 100.18 and 100.20 of the Wisconsin Statutes prohibit respectively “deceptive advertising”<sup>104</sup> and “unfair methods of competition in business and unfair trade practices in business . . . ,”<sup>105</sup> the deceptive and unfair practices proscribed by the Unfair Sales Act can be addressed by expanding section 100.20 and attendant Department regulations while correcting the inadequacies of the current law.

### VIII. CONCLUSION

The Unfair Sales Act is an unwieldy piece of ineffective legislation. Despite numerous complaints it rarely has been judicially enforced. Because it provides no compensation for injured parties it relies on society as a whole to pay the cost of enforcement. The few actions brought by the state are subject to charges of selective enforcement in light of the widespread abuses in the marketplace and the ease with which a *prima facie* case can be established. Unfortunately, it helps neither the small merchant nor the consumer. A reappraisal of the goals and accomplishments of the Unfair Sales Act and alternative means to accomplish its worthwhile objectives is in order.

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103. WIS. STAT. § 100.30(1) (1979).

104. *Id.* § 100.18.

105. *Id.* § 100.20(1).